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No. 85-1210

IN THE

Supreme Court of the United States

October Term, 1985

NORBERTO LUIS SANTIESTEBAN,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

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19pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE DENIED 7

A. The Case Has No Precedential Value 8

B. The Result Will Not Change upon Review of the Case by the Court 8

C. The Case Is Factually Distinguishable From This Court's Decisions on the Issue of Illegal Arrests and Their Fruits 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Brown v. Illinois,
422 U.S. 590 (1975) 10, 13

Davis v. Mississippi,
394 U.S. 721 (1969) 10, 11

Dunaway v. New York,
442 U.S. 200 (1979) 10, 11

Florida v. Royer,
460 U.S. 491 (1983) 7, 10, 11, 13

Hayes v. Florida,
___U.S.___, 105 S.Ct. 1643 (1985) 10, 11

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 8, 10

Taylor v. Alabama,
457 U.S. 687 (1982) 10

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 8, 9, 11, 12, 14

United States v. Brown,
499 F.2d 829 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974) 8

United States v. Maggard,
451 F.2d 502 (5th Cir.), *cert. denied*, 405 U.S. 1045 (1972) 8, 9, 14

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 8, 9, 11, 12

United States v. Mejias,
452 F.2d 1190 (9th Cir. 1971) 9

United States v. Mendenhall,
446 U.S. 544 (1980) 9, 12

United States v. Nieves,
609 F.2d 642 (2nd Cir. 1979) 8

United States v. Palmer,
575 F.2d 721 (9th Cir. 1978) 8, 14

United States v. Place,
462 U.S. 696 (1983) 11

United States v. Wardlaw,
576 F.2d 932 (1st Cir. 1978) 8

Wong Sun v. United States,
371 U.S. 471 (1963) 10, 11, 13, 14

NEW MEXICO RULE CITED:

Rule 601(c), New Mexico Rules of
Appellate Procedure for Criminal,
Children's Court, Domestic Relations
Matters and Workers' Compensation
Cases, NMSA 1978 (1983 Repl. Pamp.) 8

OTHER AUTHORITIES CITED:

Maguire, Evidence of Guilt (1959) 10

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, State of New Mexico, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the denial of a petition for writ of certiorari by the New Mexico Supreme Court and of the Memorandum Opinion of the New Mexico Court of Appeals in this case.

STATEMENT OF THE CASE

To ensure that the Court's resolution of the petition for writ of certiorari is based on a statement of the case which is relevant, fair and accurate, Respondent sets forth the following facts.

In his petition, Petitioner states that he "speaks very little English." (Petition 3). All conversation among Petitioners, his brother, border patrol agents, and narcotics officer was in Spanish. (Supplemental Transcript of Proceedings 12, 53, 69-70, 79). The Santiestebans did not testify that they did not understand what the officers said to them. Moreover, Petitioner testified specifically that he "understood perfectly well what he (Border Patrol Agent Ramirez) was saying." (Supp. Tr. 79). Petitioner's brother also testified that he understood "perfectly" what Agent Ramirez said to and asked of him. (Supp. Tr. 69-70). Agent Ramirez was the primary officer speaking with the Santiestebans.

In relating the bases for the agents' decision to pursue Petitioner's vehicle after it had left the fixed border patrol checkpoint, Petitioner states "Ramirez claimed he thought it was unusual that the vehicle did not come to a complete stop, even though the inspecting agent waved it through." (Petition 4). The latter part of Petitioner's statement, "even though . . . through," is an editorialization by Petitioner and not testimony by the agent. (Supp. Tr. 8). Agent Ramirez did testify that he thought it was unusual that Petitioner's vehicle did not make a complete stop or pull up to the inspection booth which is normal for people to do. He additionally testified that the agents "found in the past that people that don't really want to get too close to us will stay in the middle of the lane." (Supp. Tr. 8). Based on his past experience at the checkpoint, it has been Agent Ramirez' experience that people in cars with

Florida license plates sometimes are foreigners and "quite a few of them . . . are out of status" with United States' immigration requirements. (Supp. Tr. 18-19). Agent Ramirez has been a border patrol agent for ten years. (Supp. Tr. 16).

In relating what drew his attention to Petitioner's vehicle at the checkpoint, Agent Jones mentioned the vehicle's windows and described them as "dark" and "blacked out". (Supp. Tr. 39). Agent Jones had been a border patrol agent for nine and a half years. (Supp. Tr. 29). It was his experience that people sometimes enter the United States through Florida, buy a car there, and thereafter go to other points in the United States. (Supp. Tr. 32). His particular experience with vehicles with temporary Florida license tags is that the vehicles' occupants have always been aliens. (Supp. Tr. 32, 42).

Petitioner's vehicle was stopped by Agents Ramirez and Jones three to ten miles west of the checkpoint. (Supp. Tr. 44, 63, 73). Petitioner testified the vehicle was stopped "about three or four miles" from and "perhaps five minutes" after they had left the checkpoint. (Supp. Tr. 73). His brother testified that the vehicle was stopped "three miles, more or less" from the checkpoint. (Supp. Tr. 63).

Agent Ramirez did the initial questioning while agent Jones stayed at the agents' vehicle. (Supp. Tr. 33). Agent Ramirez testified that he asked the three occupants for citizenship papers. (Supp. Tr. 10). He received immigration papers from them and the driver's license from the driver, Petitioner's brother, Nelson Santiesteban. (Supp. Tr. 10, 19-20). (Nelson, but not Agent Ramirez, testified that the agent told him he was speeding. (Supp. Tr. 64).

Agent Ramirez asked Nelson whether anybody was in the trunk. (Supp. Tr. 27). Nelson replied "no". Agent Ramirez next asked permission to look into the trunk after which

Nelson said "sure", "readily took the ignition keys", walked to the trunk,and opened it. (Supp. Tr. 27-28). Nelson testified that he had "absolutely" no objection to opening the trunk and that "at no time" was he forced to open the trunk. (Supp. Tr. 69-70). Petitioner testified that he had no objection to having Agent Ramirez look in the trunk. (Supp. Tr. 80).

Agent Ramirez testified that he looked into the trunk but did not look into any suitcases. (Supp. Tr. 20). He indicated that a suitcase might have been opened by one of the subjects in order to retrieve his identification papers. (Supp. Tr. 20-21). Agent Jones did not see any search made of the contents of the trunk. (Supp. Tr. 44-45). Nelson offered conflicting testimony of a search by Agent Ramirez of suitcases. (Supp. Tr. 65).

Agent Ramirez testified he consulted with Agent Jones at their vehicle on the authenticity of the immigration papers he had received. According to Agent Ramirez, the agents decided that it was necessary to go back to the checkpoint to verify the papers. (Supp. Tr. 10, 12, 21). Agent Ramirez testified that he normally verifies the immigration card by passing it under a purple light device which detects a code on authentic immigration cards. (Supp. Tr. 21, 18). The device is kept at the checkpoint. (Supp. Tr. 21, 28).

After Agent Ramirez talked to Agent Jones about verification of the immigration papers, he asked Petitioner whether he would mind going back to the checkpoint. (Supp. Tr. 11). Petitioner answered affirmatively and said "why not, he had no reason not to." (Supp. Tr. 11). Petitioner was very cooperative. (Supp. Tr. 11).

The agents also, on the highway, talked to Petitioner and his brother about the recurring problem of drugs being secreted in cars sold in Florida, without the buyers' knowledge. (Supp. 35, 45, 66). During Agent Ramirez' initial encounter with

Petitioner's vehicle on the highway, the agent noticed an extremely heavy perfume-like odor coming from inside the car. In his experience as a border patrol agent, Agent Ramirez had previously encountered such odors being used to mask the smell of illegal drugs. (Supp. Tr. 11-12). Agent Jones also noticed the smell when he approached the vehicle. (Supp. Tr. 34).

Petitioner and his brother testified that Agent Ramirez asked each whether he had any reservations about going back to the checkpoint to search the vehicle for drugs. (Supp. Tr. 65, 75). Petitioner further testified that he understood what the agent asked of him, that he had no objection to returning to the checkpoint, and that he was not forced to go back against his will. (Supp. Tr. 80-81). His brother testified that he had "no reservations", "absolutely" no objection to returning to the checkpoint, and voluntarily returned. (Supp. Tr. 66, 70-71). Agent Jones testified that the vehicle's occupants were not under arrest. (Supp. Tr. 36).

The initial stop on the highway lasted between five and fifteen minutes. When the agents and the three occupants of Petitioner's car returned to the checkpoint, all went inside the checkpoint trailer office. (Supp. Tr. 23, 67). A third agent at the checkpoint left as soon as they drove up, leaving agents Ramirez and Jones alone with the Santiestebans. (Supp. Tr. 23). Petitioner, his brother, and his wife were "not handcuffed or restrained in any way." (Supp. Tr. 53). Agent Ramirez ran a check on the immigration cards. (Supp. Tr. 12). He asked Petitioner again whether the agents could search the vehicle. (Supp. Tr. 12). Petitioner said he had no complaints about a search of the car. (Supp. Tr. 12). Agents Ramirez and Jones explained "fully" in Spanish a written consent to search form to Petitioner; Petitioner thereafter signed the form, indicating that he understood its contents. (Supp. Tr. 12-13). Agent Jones testified Petitioner said he had no objection to the search and

had nothing to hide. (Supp. Tr. 37). Petitioner testified he had no reservations about the search. (Supp. Tr. 75). His brother also testified he had no objection to the search of the car. (Supp. Tr. 71).

Agents Ramirez and Jones left the trailer to search the car leaving Petitioner, his brother, and wife alone in the trailer. (Supp. Tr. 14-15, 23, 37-30, 67). They removed from the vehicle the spare tire which appeared to have something inside. The agents returned to and advised Petitioner they believed something was in the tire. They asked him whether he had any objection to their taking it apart. (Supp. Tr. 15, 39). Petitioner answered, "Sure, no problem; go right ahead." (Supp. Tr. 39).

The border patrol agents summoned narcotics officers, who arrived approximately a half hour to an hour after the vehicle had initially returned to the checkpoint. (Supp. Tr. 15, 16, 68). The border patrol agents and the narcotics officers again obtained consent from Petitioner to look inside the tire. (Supp. Tr. 53-54). Petitioner testified that in reply to the officers' request, "I said, yes, I was not committing any crimes; so I said yes." (Supp. Tr. 77). The officers asked him to accompany them to a nearby gas station where the tire would be taken off its rim. Petitioner again gave his consent. (Supp. Tr. 54). Upon opening the tire, the officers discovered six packages of cocaine concealed therein. Petitioner was thereupon arrested.

Petitioner testified that he did not believe that he was free to leave. (Supp. Tr. 76). The only basis he offered for this belief was that

> [i]n Cuba that if a policeman stopped us, we cannot say no, I don't want to talk to you. That is against the law, if a policeman stops you in Cuba.

(Supp. Tr. 76). The only basis offered by Petioner's brother for his similar belief was that he did not know that he had the

right to walk away. (Supp. Tr. 68). Had he known of the right, he would have said good-bye to the officers and continued on his way. (Supp. Tr. 68).

On appeal of his conviction, challenging the denial of his motion to suppress, to the New Mexico Court of Appeals, Petitioner stated *inter alia* "[i]t is uncontested that Defendant agreed to allow a search of his automobile and its spare tire." (Petitioner's Brief in Chief 15). The appellate court held Petitioner's car was improperly stopped. The appellate court next asked, "Does the fact that defendant's car was improperly stopped irrevocably taint any subsequent consent to search that may thereafter be given?" (Petition A-5). The court stated that "[f]ollowing the initial stop of defendant's vehicle, both defendant and his brother agreed to accompany the agents back to the checkpoint and consented to the search." (Petition A-5). Applying the totality of circumstances standard, the court held that Petitioner's voluntary consent validated the search of his car. (Petition A-6).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner contends the Court should grant his petition because the New Mexico appellate courts have held that consent alone automatically validates an otherwise unlawful search and seizure, in direct conflict with this Court's decisions on the issue of illegal detentions and the exclusion of evidence as their fruits. The Court's discretionary review should not be exercised on behalf of Petitioner where the case has no precedential value, its result will not be changed upon review by the Court, and the case is factually distinguishable from the decisions of the Court.

A. The Case Has No Precedential Value.

The opinion rendered by the New Mexico Court of Appeals was a memorandum opinion. Under New Mexico Rules of Appellate Procedure, a memorandum opinion is not published and may not be cited as precedent. New Mexico Rules of Appellate Procedure for Criminal, Children's Court, Domestic Relations Matters and Worker's Compensation Cases, Rule 601(c), NMSA 1978 (1983 Repl. Pamp.). Thus, unless the result reached by the appellate court is wrong, this Court should not exercise its discretion to review the analysis of an opinion which has no precedential value.

B. The Result Will Not Change upon Review of the Case by the Court.

The New Mexico Court of Appeals determined that Petitioner's vehicle was improperly stopped. Respondent submits that determination is incorrect and that consequently Petitioner's voluntary consent to search his vehicle for drugs was without question sufficient to validate the search. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Stops for questioning at permanent immigration checkpoints may be made in the absence of a warrant or any individualized suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Federal circuit courts have also determined that no greater justification is required to stop a person who has once passed through a customs inspection area but who is temporally and physically in proximity to the inspection area. *United States v. Nieves*, 609 F.2d 642 (2nd Cir. 1979); *United States v. Wardlaw*, 576 F.2d 932 (1st Cir. 1978); *United States v. Palmer*, 575 F.2d 721 (9th Cir. 1978); *United States v. Brown*, 499 F.2d 829 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974); *United States v. Maggard*, 451 F.2d 502 (5th Cir.), *cert. denied*, 405

U.S. 1045 (1972); *United States v. Mejias*, 452 F.2d 1190 (9th Cir. 1971).

In *Maggard* the Fifth Circuit held, as a valid permanent checkpoint stop, the stop of a vehicle two miles from and a few minutes after it had left a permanent checkpoint. The vehicle had been allowed through the checkpoint after a cursory examination. As it passed through the checkpoint, the low ride of the vehicle led the border patrol officers to believe that illegal aliens were in the vehicle. They pursued and stopped the vehicle. The Fifth Circuit held that a person is not "immune from further examination by customs agents merely because he may momentarily escape and pass safely through the first customs check." *Maggard, supra,* at 504.

Pursuant to the reasoning of the federal circuit courts, the stop of Petitioner's vehicle three to ten miles from the permanent checkpoint which he had gone through five minutes before was a proper checkpoint stop requiring no warrant or reasonable suspicion.

There was also sufficient justification to stop the vehicle under the roving patrol standard for immigration checks. This stop must be justified by reasonable suspicion that the vehicle contains illegal aliens. *Brignoni-Ponce, supra.*

> In reviewing the factors that led the agents to stop and question [Petitioner], it is important to recall that a trained law enforcement agent may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." (Citation omitted). . . . "In all situations the officer is entitled to assess the facts in light of his experience." (Citation omitted).

United States v. Mendenhall, 446 U.S. 544, 564 (1980) (Opinion of Powell, J.).

The collective observations of Agents Ramirez and Jones assessed in light of their experience as border patrol agents at the checkpoint established reasonable suspicion to believe that the Petitioner's vehicle contained illegal aliens. The driver of the vehicle was evasive as he drove through the checkpoint. The occupants appeared to be of Latin descent. The vehicle had temporary Florida license plates which based on the Agents' combined 19-year experience indicated that illegal aliens were likely to be in the vehicle.

In light of the propriety of the stop of Petitioner's vehicle, Petitioner's voluntary consent was sufficient to validate the search. *Schneckloth, supra.*

C. The Case Is Factually Distinguishable From This Court's Decisions on the Issue of Illegal Arrests and Their Fruits.

In *Wong Sun v. United States,* 371 U.S. 471 (1963), the Court set forth the principles for determining whether statements and other evidence should be excluded as the fruits of an illegal arrest or search. The Court announced that the issue should be resolved by determining "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun, supra* at 488, quoting Maguire, Evidence of Guilt, 221 (1959). The *Wong Sun* principles have since been consistently and only applied by the Court in cases where the illegal detention was a formal arrest or was tantamount to an arrest and the objected-to evidence was obtained by that illegality. *Florida v. Royer,* 460 U.S. 491 (1983); *Taylor v. Alabama,* 457 U.S. 687 (1982); *Dunaway v. New York,* 442 U.S. 200 (1979); *Brown v. Illinois,* 422 U.S. 590 (1975). *See also Hayes v. Florida,* __U.S.__, 105 S.Ct. 1643 (1985); *Davis v. Mississippi,* 394 U.S. 721 (1969).

Critical to the Court's determination that a detention was tantamount to an arrest was the fact of the defendant's involuntary transportation by officers to a police interrogation room for questioning. *Royer, supra; Dunaway, supra. See also Hayes, supra; Davis, supra.* In *Florida v. Royer,* upon which Petitioner relies heavily, relevant factors to this determination also were Royer's confinement in a small interrogation room – a large closet – equipped with a desk and two chairs, with officers who told him they suspected he was carrying narcotics. The officers retrieved his luggage without his consent. They did not tell Royer until the encounter was relocated to the small room of their interest in the contents of his luggage. They had his ticket and identification and never informed him he was free to leave. The officers would have restrained Royer if he had attempted to leave. Royer was verbally unresponsive to the officers' request to accompany them and to the search of one of his suitcases.

This case is unlike *Wong Sun* and its progeny. Petitioner was not formally arrested until after the cocaine was discovered. Nor was he detained under circumstances tantamount to an arrest when he gave his consents to search his vehicle for drugs.

Petitioner's initial consent was given prior to the relocation of the encounter with the agents and under circumstances minimally intrusive on his Fourth Amendment interests.[1] *See United States v. Place,* 462 U.S. 696 (1983); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976); *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975). He gave this consent where his vehicle was stopped on the highway for an immigration check of its occupants. The agents limited the stop to

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[1] Although the court of appeals determined that Petitioner's vehicle was improperly stopped, it did not determine that the agents' conduct after the stop exceeded what would have been permissible in conducting an immigration check.

matters within the scope of an immigration check, i.e., examination of immigration papers and the driver's license, and with the driver's consent, examination of the trunk for hidden persons. *See Martinez-Fuerte, supra; Brignoni-Ponce, supra.*

By his own testimony, Petitioner voluntarily accompanied the agents "in the spirit of apparent cooperation" to the checkpoint for a search of his vehicle for drugs. *See United States v. Mendenhall,* 446 U.S. 544, 553 (1980) (Opinion of Stewart, J.). The agents told Petitioner and his brother of the recurring problem of drugs being secreted in cars being sold in Florida, without their buyers' knowledge. Agent Ramirez asked them whether they had any reservations about returning to the checkpoint to search the car for drugs. Petitioner testified that he understood what was asked of him, had no objection to returning to the checkpoint, and was not forced to go back against his will. His brother likewise had no reservations, had absolutely no objection to returning to the checkpoint, and voluntarily returned.

The consensual move of the encounter with the agents to the checkpoint was not thereafter transformed into circumstances of an arrest. Petitioner and his companions were taken to a trailer and not an interrogation room. They were not restrained in any way. The agents did not retrieve Petitioner's vehicle or its contents without his consent. Rather, they first obtained Petitioner's written consent to search the vehicle and later obtained his consent to take the tire apart. Petitioner had no reservations about signing the consent form. He was left alone with his brother and wife while the agents searched the vehicle, thereby having time for reflection and consultation. Upon the agents return to him with the spare tire, he gave his consent to take the tire apart, stating, "Sure, no problem; go right ahead."

Petitioner offered no objective basis for a belief that he was not free to leave. His only basis for such a belief—police/citizen

encounters in Cuba—was subjective and unrelated to the circumstances of his encounter with the agents. His brother's only basis for a similar belief was likewise subjective and unrelated to the circumstances of the encounter. There was no testimony that the agents intended to restrain them. There was no testimony that the agents took advantage of Petitioner's Cuban status or his unawareness of his right to refuse consent. The facts are clear and unequivocal therefore that Petitioner's consent to accompany the agents was voluntary and not acquiescence to an assertion of lawful authority.

What began as an improper stop (according to the appellate court) proceeded to a minimally intrusive detention to check on immigration status. It next proceeded to a consensual police/citizen encounter. Petition gave voluntary consents to search his vehicle and spare tire under those circumstances and not those tantamount to an arrest. The principles of *Wong Sun* and its progeny, applicable only to evidence obtained after an illegal arrest, consequently are inapposite. There is no conflict between this case and the decisions of the Court.

If the illegal detention of Petitioner were sufficient to invoke the principles of *Wong Sun*, the evidence was nevertheless not obtained by exploitation of the illegality. Three factors are relevant to the inquiry: the "temporal proximity of the arrest and [the evidence], the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct." *Brown, supra* at 603-604. Focus on *Royer* is again appropriate in light of Petitioner's assertion of the similarity of the two cases.

The preceding discussion of this case and *Royer* demonstrates that the two differ materially on the most important factor to the present inquiry: the purpose and flagrancy of the official misconduct. Royer's detention was an arrest on suspicion of possession of drugs. The detention was both purposeful and flagrantly executed. *Royer, supra* at 496, 502-503.

On the other hand, Petitioner was only detained on the highway and that detention was for immigration verification. The record shows no improper purpose. Belief in the propriety of the stop was reasonable. *See, e.g., Brignoni-Ponce, supra; Palmer, supra; Maggard, supra;* Section B, *supra.* The action taken by the agents during the detention was limited to matters within the scope of an immigration check. In short, the highway detention was not exploited to gain evidence of drugs.

Because this case is factually distinguishable from *Wong Sun* and its progeny, no illegal arrest and no exploitation, the Court should deny the petition.

CONCLUSION

Respondent, State of New Mexico, respectfully requests the Court to deny the writ of certiorari. The exercise of the Court's discretion in favor of the question raised by the petition would be imprudent where the case has no precedential value, the result will remain unchanged upon review of the case by the Court, and the case is factually distinguishable from the Court's decisions.

Respectfully submitted,

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